

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>NICHOLAS BOURNIAS</b>	:	SMALL CLAIMS
	:	DETERMINATION
	:	DTA NO. 820305
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period September 1, 2001 through August 31,	:	
2003.	:	

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Petitioner, Nicholas Bournais, 645 Main Street, Apt. # 708, Bethlehem, Pennsylvania 18018, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2001 through August 31, 2003.

A small claims hearing was held before Brian L. Friedman, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 4, 2005 at 1:15 P.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Thomas Jess and Jeffrey Jennings).

Since neither party elected to reserve time for the submission of post-hearing briefs, the three-month period for the issuance of this determination began as of the date the hearing was held.

***ISSUE***

Whether petitioner timely filed either a Request for a Conciliation Conference with the Division of Taxation's Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals following the issuance of a Notice of Determination.

***FINDINGS OF FACT***

1. During the period at issue, Nicholas Bournias (“petitioner”) was a licensed mobile food vendor in New York City and possessed a Certificate of Authority to collect sales and use taxes on his sales of food. Pursuant to a desk audit conducted by the Division of Taxation (“Division”), a Notice of Determination, dated May 3, 2004, was issued by the Division to petitioner which assessed additional sales and use taxes in the amount of \$8,727.52, plus penalty and interest, for a total amount due of \$12,529.97 for the period September 1, 2001 through August 31, 2003.

2. On September 28, 2004, the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) received a copy of form DTF-968.1, Disagreement with Findings, on which the following handwritten statement was set forth: “Sirs, We would like to request a conference, concerning this matter. We do not agree with the findings. Thank you.” The statement was signed by petitioner, as owner, and was dated “9/6/04.”

The request for a conciliation conference was mailed in an envelope which bore the return address of petitioner’s former accountant, Nicholas M. Kalogeras, of Bethlehem, Pennsylvania. The envelope bore a United States Postal Service (“USPS”) postmark of September 14, 2004.

3. On October 15, 2004, BCMS issued a Conciliation Order Dismissing Request which stated as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on May 3, 2004, but the request was not mailed until September 14, 2004, or in excess of 90 days, the request is late filed.

The request for a Conciliation Conference is denied.

Thereafter, the Division of Tax Appeals received from petitioner a timely filed petition seeking a small claims hearing. Since the Division has raised the issue of the timeliness of

petitioner's request for a conciliation conference, the scope of the hearing held herein was limited to this threshold jurisdictional issue.

4. To establish the date and method of mailing of the Notice of Determination, the Division offered into evidence: its certified mailing record ("CMR") for statutory notices mailed on May 3, 2004, a copy of the Notice of Determination issued to petitioner, affidavits of three employees, Geraldine Mahon, Bruce Peltier and Heidi Corina, familiar with the creation, processing and mailing of notices of determination and copies of USPS form 3811-A, Request for Delivery Information/Return Receipt After Mailing and the response of the USPS thereto. Taken together, these documents are sufficient to establish that the notice was properly addressed and sent by certified mail to petitioner's last known address on May 3, 2004. Petitioner did not present any evidence to show that the notice was not properly mailed or timely received or that he filed a timely protest within 90 days of the issuance of the statutory notice. In fact, although not conceded, there appears to be no dispute on petitioner's part that he received the notice in a timely manner<sup>1</sup> or that his request for a conciliation conference was mailed on September 14, 2004.

### ***CONCLUSIONS OF LAW***

A. The Division claims that it is entitled to dismissal of the petition because petitioner failed to file a timely request for a conciliation conference or a timely petition for a hearing before the Division of Tax Appeals. Tax Law § 1138(a)(1) authorizes the Division to estimate tax due and to issue a notice of determination to a taxpayer if a return required under Article 28 is not filed, or if a return, when filed, is incorrect or insufficient. Pursuant to this paragraph,

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<sup>1</sup> The response of the USPS to the Request for Delivery Information/Return Receipt After Mailing (form 3811-A) indicates that the Notice of Determination was delivered on May 6, 2004 to petitioner's address at 2018 78<sup>th</sup> Street, Brooklyn, New York and was received at that address by Christy Bournias.

after 90 days from the mailing of a notice of determination, such notice shall be an assessment of the amount of tax specified in the notice together with the interest and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such 90-day period applied to the Division of Tax Appeals for a hearing. As an alternative to filing a petition for a hearing with the Division of Tax Appeals, a taxpayer may file a request for a conciliation conference with BCMS which is what this petitioner elected to do. The time period for filing such request is also 90 days (Tax Law § 170[3-a][e]; 20 NYCRR 4000.3[c]). The filing of a petition or a request for a conciliation conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). Where the timeliness of a request for a conciliation conference or a petition for a hearing is at issue, the Division has the burden to establish that it properly mailed the statutory notice at issue to the taxpayer at his last known address (*Matter of Perk*, Tax Appeals Tribunal, December 13, 2001).

B. Tax Law § 1147(a)(1) provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” This section further provides that the mailing of such a notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced, and the burden of proving proper mailing rests with the Division (*Matter of Novar TV & Air Conditioning Sales & Service, Inc.*, Tax Appeals Tribunal, May 23, 1991).

C. In the present matter, the Division has presented sufficient evidence to prove that the Notice of Determination was properly mailed to petitioner at his last known address on May 3, 2004. Accordingly, in order to timely protest the notice, petitioner was required to file the request for conciliation conference within 90 days of May 3, 2004, i.e., on or before August 1, 2004. Since, in 2004, August 1<sup>st</sup> fell on a Sunday, petitioner had until the next business day, or Monday, August 2, 2004, to file his request (*see*, General Construction Law § 25-a).

D. It is undisputed that petitioner's request for a conciliation conference was not mailed until September 14, 2004, and therefore, it is clear that the request was filed beyond the statutory 90-day period. Tax Law § 1147(a)(2) provides that when a document which is required to be filed on or before a prescribed date is "delivered by United States mail to the . . . bureau . . . with which or with whom such document is required to be filed . . . the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery." Since the envelope containing petitioner's request for a conciliation conference bore a USPS postmark of September 14, 2004, it is that date which is properly deemed to be the date on which petitioner filed his request and such date is beyond the statutory 90-day period. Accordingly, the Division of Tax Appeals is without jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989) and the petition must be dismissed.

E. The petition of Nicholas Bournias is hereby dismissed.<sup>2</sup>

DATED: Troy, New York  
December 22, 2005

/s/ Brian L. Friedman  
PRESIDING OFFICER

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<sup>2</sup> Petitioner may not be entirely without recourse in this matter. That is, while the filing of a timely protest allows a taxpayer to challenge a notice of determination prior to payment thereof, a taxpayer may still challenge the merits of the notice by making payment of the assessment and thereafter filing a claim for refund. Accordingly, petitioner may pay the assessment and, within two years of payment, file a claim for refund (Tax Law § 1139[c]). Upon its denial, petitioner may then proceed with a timely petition for a hearing or a request for a conciliation conference to contest the refund denial.